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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 ) MM Docket No. 97-217  
Amendment of Parts 1, 21 and )  
74 to Enable Multipoint Distribution ) File No. RM-9060  
Service and Instructional Television )  
Fixed Service Licensees to Engage )  
in Fixed Two-Way Transmissions )  
 )

**COMMENTS OF WEBCEL COMMUNICATIONS, INC.**

WebCel Communications, Inc. ("WebCel"), by its undersigned counsel, submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above captioned proceeding, which proposes to allow Multipoint Distribution Service ("MDS") and Instructional Television Fixed Services ("ITFS") licensees to engage in fixed two-way services.<sup>1</sup>

WebCel is a privately-held corporation formed to develop local broadband wireless services utilizing Local Multipoint Distribution Service ("LMDS"). WebCel intends to participate in the upcoming LMDS spectrum auction scheduled to commence on February 18, 1998, and to build and operate LMDS systems in markets where it is the winning bidder. As such, WebCel, which will be bidding at auction for the flexibility that the Commission proposes to grant to the wireless cable industry for free, would be significantly and adversely affected by

<sup>1</sup> Notice of Proposed Rulemaking, *Matter of Amendment of Parts 1, 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees To Engage in Fixed Two-Way Transmissions*, MM Docket No. 97-217 (rel. Oct. 10, 1997) ("NPRM").

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the Commission's adoption of its proposal for fundamental restructuring of the service rules for MDS and ITFS.

### **INTRODUCTION**

WebCel objects to the changes contained in the Notice of Proposed Rulemaking ("*NPRM*"), which represent a complete revision of MDS and ITFS to establish a new service with almost unlimited two-way flexibility. This proposed change would result in an unprecedented windfall to MDS licensees, which will possess licenses worth substantially more than the limited one-way licenses they acquired less than two years ago at auction. It will also devalue licenses for other auctioned spectrum, because bidders will be reluctant to pay a premium for flexible spectrum when the FCC is simply giving it away to competing services, and it will exacerbate the already difficult process of wireless capital formation by introducing additional uncertainty into the marketplace.

Overall, the proposed rules represent bad spectrum policy, raising questions about the value of auctioned services at a time when the Commission should be acting to inject certainty and predictability into the auctions process. Rather than giving the MDS and ITFS licensees the proposed flexibility, the Commission should either reject its proposed grant of unlimited two-way services or devise a way whereby the flexibility right can be valued and paid for. This will ensure that the benefits flow to the public rather than to a handful of MDS and ITFS licensees.

### **BACKGROUND**

The MDS and ITFS services include up to thirty-three 6 MHz licenses per BTA, comprising a total of almost 200 Mhz in the 2 GHz band. Although each license has a small "return channel," the limited capacity of this "return channel" has meant that MDS and ITFS have functioned since their inception essentially as one-way, point-to-multipoint services used

for the delivery of wireless cable. ITFS is essentially the same as MDS except that it has certain educational programming requirements that have been partially eroded by a program of capacity leasing to MDS providers, which only promises to lead to greater commercialization as a result of the proposed rule changes.

In 1996, the Commission auctioned authorizations for MDS service, giving auction winners a protected service area where they had the right to construct and license facilities to provide service on any available channels in the BTA.<sup>2</sup> The total bid at auction of \$216.3 million reflected that the licenses were often restricted to a limited number of available channels and were limited to one-way operation.<sup>3</sup> Since that time, a number of licensees have apparently aggregated authorizations combining most if not all available channels in their BTA.<sup>4</sup>

In the *NPRM*, the Commission proposes vast, fundamental changes in MDS and ITFS which would increase the value of these services substantially beyond the small figure paid for MDS at auction in 1996. The changes will transform these services from one-way into two-way services with virtually unlimited flexibility, allowing them to compete with other services that the Commission has or shortly will auction.

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<sup>2</sup> Report & Order, *Matter of Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 9589 ¶¶ 1, 2 (1995) ("MDS Auction Order").

<sup>3</sup> See Third Annual Report, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133 ¶ 52 (rel. Jan 2, 1997) ("1996 Cable Report").

<sup>4</sup> See e.g., *AMI Statement of Intention* at 2 (May 10, 1996) (AMI, a subsidiary of CAI, "will have rights to all of the available channel capacity in the Washington, D.C. BTA" after the conclusion of lease negotiations with 2 licensees); See also *Opposition of WebCel Communications, Inc. To Petition for Rulemaking in File No. RM-9060* at 13 ("WebCel Opposition").

## DISCUSSION

### **I. BY GRANTING THE PROPOSED TWO-WAY FLEXIBILITY, THE COMMISSION WILL FUNDAMENTALLY ALTER THE MDS AND ITFS SERVICE, THUS FAVORING MDS AND ITFS LICENSEES TO THE DETRIMENT OF THE PUBLIC AND LICENSEES IN OTHER SERVICES**

The changes proposed in the *NPRM* were initiated at the urging of a group of MDS and ITFS licensees (“Petitioners”) who claimed that they need to offer new two-way services such as wireless internet access in order to compete in the marketplace.<sup>5</sup> These changes are in reality a transparent attempt by the Petitioners to increase the value and usefulness of this spectrum *after the service has already been auctioned and paid for*. These licensees plan to challenge companies employing competing distribution services *who intend to offer many of the same two-way services, but whose ability to compete will be hampered by the financial burden of paying for flexibility at auction*. Clearly, it would be anomalous and unreasonable for the Commission to institute these changes, knowing that licensees in other services pay for this flexibility.

The Petition proposing adoption of the *NPRM* was offered under the pretense that the MDS/ITFS service had always been a two-way service. Similarly, in the *NPRM*, the Commission notes WebCel’s objection that the proposed rule changes to institute two-way service would fundamentally alter the nature of MDS and ITFS,<sup>6</sup> then dismisses these concerns by stating that “the types of two-way service that the rule changes would encourage already have been authorized to MDS licensees.”<sup>7</sup> In fact, since its inception, MDS/ITFS has been essentially

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<sup>5</sup> *Petition For Rulemaking*, File No. RM-9060 (filed Mar. 14, 1997)(“*Petition*”).

<sup>6</sup> *NPRM* ¶ 10.

<sup>7</sup> *Id.*

a one-way service. For example, in the Order authorizing auctions for MDS service, the Commission stated that “we are not fundamentally changing the nature of the service. Licensees still will be providing wireless cable service . . . competitive with cable television.”<sup>8</sup> Additionally, while there has always been a “return channel” available for licensees, the channel has a relatively narrow bandwidth. Some MDS licensees, finding their return channels to be unsuitable for two way service, have attempted to simulate two-way capability by obtaining licenses in the 18 GHz band for return transmissions.<sup>9</sup>

Moreover, the very order the Commission uses to support its criticism of WebCel’s concerns specifically stated that MDS “transmission is *one-way* in that the audience can not use the system to respond to the communication, although return voice communications may be obtained *by simultaneous use of telephone lines*.”<sup>10</sup> The fact that users may use telephone links for return communications hardly means that the Commission has already allocated MDS/ITFS spectrum for two-way transmissions. Any assertion to the contrary is belied by the 62 pages of proposed technical changes which accompanied the Petition to implement two-way operation.<sup>11</sup>

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<sup>8</sup> *MDS Auction Order* ¶ 92. This fact was not changed by the Commission’s Order authorizing digital transmission by MDS/ITFS licensees as implied by the *NPRM*. *NPRM* ¶ 8. In the *Digital Declaratory Ruling*, the Commission did nothing to expand the service parameter authorizations to allow the unlimited two way flexibility which the Commission now proposes. See *Declaratory Ruling and Order, Matter of Request for Declaratory Ruling on the Use of Digital Modulation by Multipoint Distribution Service and Instructional Television Fixed Service Stations*, 11 FCC Rcd 18839 (1996)(“*Digital Declaratory Ruling*”).

<sup>9</sup> *Petition* at 24; Report and Order, *Establishment of a Spectrum Utilization Policy for the Fixed and Mobile Services Use of Certain Bands Between 947 MHz and 40 GHz*, 56 Rad. Reg. 2d (P&F) 1171, 1181 (1994).

<sup>10</sup> Report and Order, *Amendment Of Parts 1, 2, 21, And 43 Of The Commission's Rules And Regulations To Provide For Licensing And Regulation Of Common Carrier Radio Stations In The Multipoint Distribution Service*, 45 FCC 2d 616 ¶ 5 (1974)(*Emphasis added*).

<sup>11</sup> *Petition* at Appendix B. The proposed changes include permitting licensees to utilize all or part of each 6 Mhz channel for return path transmissions from subscriber premises, to cellularize their transmission systems to take advantage of spectrally efficient frequency reuse techniques, to employ modulation schemes consistent with bandwidths larger or smaller than 6 MHz, and to permit subchannelization. *NPRM* ¶¶ 9, 16.

Clearly, the *flexibility* to provide these services has a price, and there are companies that have paid or will pay for this flexibility at auction. When the current MDS licensees purchased this spectrum, they were aware of the limitations associated with a one-way service, and the BTA authorizations were valued in light of these service parameters. Indeed, had the flexibility now proposed been available at the time of the MDS auction, there is no doubt that many other firms that sat out would have participated, both increasing the amount raised at auction and introducing additional competitive and innovative forces into the market.

**II. BY GIVING AWAY SPECTRUM FLEXIBILITY TO SOME LICENSEES WHILE MAKING THEIR COMPETITORS PAY FOR IT, THE COMMISSION DEVALUES SPECTRUM HELD BY OTHER LICENSEES AND DISRUPTS THE WIRELESS CAPITAL FORMATION PROCESS**

As WebCel argued in its *Opposition to the Petition*, an essential component of spectrum valuation is reasonable certainty as to the procedural and substantive rules governing the service.<sup>12</sup> By conferring substantial new benefits on licensees in existing services, the Commission has concomitantly reduced the value of spectrum held by competing services and at the same time introduced substantial uncertainty into the capital formation process for all services.

First, if the Commission changes the rules by making some licensees pay for flexibility while others (including the Petitioners) receive it for free, this will reduce the value of spectrum in future auctions. One reason is that spectrum users will not devote substantial capital toward new auctions when some of their competitors suddenly receive extremely valuable post-auction benefits such as spectrum flexibility. Additionally, auctioning services under a cloud of

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<sup>12</sup> *WebCel Opposition* at 14.

uncertainty will ensure that bid levels are low, as demonstrated by the WCS auctions, which raised only a small percentage of the predicted total bid.<sup>13</sup>

Second, because it will be impossible to assess values reliably when the Commission selectively grants post-auction benefits to some services, the proposed rule changes will also interfere with the capital formation process. This uncertainty will be ruinous for bidders trying to raise money for auctions in other services. Currently, the process for raising funds to participate in auctions is already extremely difficult. This problem is especially acute for small bidders who--unlike large, well funded bidders--are not able to access existing lines of credit, float commercial paper, or obtain bridge financing. As the Commission observed in the *Spectrum Cap Report and Order*, "[o]ne of the most formidable barriers to [auction] participation is the difficulty [small] businesses face in raising sufficient capital to compete in the highly capital-intensive wireless communications businesses."<sup>14</sup> By introducing uncertainty into spectrum valuation, the Commission makes it that much more difficult for small businesses to raise money for build-out--an effect that extends to bidders in all auctioned services.<sup>15</sup>

The Commission recently recognized the relationship between administrative certainty and successful capital formation in its Order restructuring debt obligations for PCS C-Block

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<sup>13</sup> *Latest License Auction Disappoints FCC; Total Comes Up Short of Expectations in Bargain Basement Bidding*, Washington Post, April 26, 1997, Section D, at 1.

<sup>14</sup> *Spectrum Cap Report and Order*, 11 FCC Rcd 7824 ¶ 124.

<sup>15</sup> For example, the effect of uncertainty was apparent during the PCS C-Block debt restructuring, where "critics of [the Commission's] plan contended that [the] Wireless Bureau and Commission must adhere to current rules or risk weakening [the] rest of [the] wireless industry." One bidder noted that "FCC action to relax rules would be 'profoundly unfair' to other bidders who prepared business plans and either adjusted to reflect market changes or withdrew from market." Communications Daily, *Analysts Urge Quick Action, Deep Discounts, For C-Block Licensee Success* (July 1, 1997).

licensees. Stating that it is vital to preserve “regulatory certainty,”<sup>16</sup> the Commission put forward a proposal which contained the minimum possible level of change to the rules, thereby “maintain[ing] the integrity for all of our future auctions and... ensur[ing] that all participants are treated fairly and impartially. *These elements are essential if the financial community is to have the stability it requires to fund the new communications enterprises and services for which this spectrum should be used.*”<sup>17</sup>

By maintaining consistent rules through administrative certainty, the Commission will go a long way towards helping to ensure stability in spectrum values. As WebCel noted in its Opposition, an FCC staff report argued that “entrepreneurs likely will bid and invest greater amounts in spectrum if they know in advance that the use will be flexible and are confident that it will remain that way.”<sup>18</sup> When the Commission proposes actions such as re-inventing MDS after the auction has been held, the value of all auctioned services is set in flux, and predictability is lost. Ultimately, the disruption which would result from the proposed rules would threaten the viability of the already-fragile auction process and undermine the financial stability of wireless providers.

## CONCLUSION

Ultimately, WebCel agrees that wireless providers are in the best position to determine the use of spectrum and favors spectrum flexibility on a going-forward basis. However, a system

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<sup>16</sup> Second Report and Order and Further Notice of Proposed Rule Making, *Matter of Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees*, 1997 FCC LEXIS 5687 ¶ 4 (rel. Oct. 16, 1997).

<sup>17</sup> *Id.* ¶ 3.

<sup>18</sup> See Gregory L. Rosston and Jeffery S. Steinberg, *Using Market-Based Spectrum Policy to Promote the Public Interest* at 20 (Jan. 1997)(“Rosston and Steinberg”).



cannot stand where some licensees pay for flexibility while others receive it for free after the fact. Clearly, the proposed rule changes would be bad spectrum policy, and the Commission should decline to adopt the rules proposed in the *NPRM*.

Respectfully submitted,

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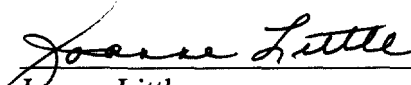
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Dated: January 8, 1998

## **CERTIFICATE OF SERVICE**

This is to certify that on this 8th day of January, 1998, a copy of the foregoing  
Comments Of Webcel Communications, Inc. was served, by hand on the persons on the attached  
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